

ALBERTA

**OFFICE OF THE INFORMATION AND PRIVACY
COMMISSIONER**

ORDER F2020-29

October 14, 2020

EDMONTON POLICE SERVICE

Case File Number 003448

Office URL: www.oipc.ab.ca

Summary: An individual made a complaint to this Office that the Edmonton Police Service (the Public Body) collected inaccurate information about him and used it to decide to ban him from a City of Edmonton facility.

The Adjudicator concluded that the Public Body did not issue a ban; the only ban was issued by the City of Edmonton. The decision made by the Public Body about the Complainant was whether to pursue an investigation into possible criminal activity. The Public Body decided a further investigation was not warranted.

The Adjudicator determined that the Public Body met its duty under section 35(a) to make every reasonable effort to ensure the accuracy of personal information when making a decision about an individual.

Statutes Cited: AB: *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25, ss. 1, 35, 36, 72

Authorities Cited: AB: Orders 97-020, F2006-018, F2007-018, F2012-05 F2013-14, F2017-39, F2017-40, F2019-06

Cases Cited: *Alane Davis v. Alberta (Information and Privacy Commissioner) Jill Clayton*, Alberta Court of Queen's Bench oral decision, February 28, 2018 (Court File Number 17090095)

I. BACKGROUND

[para 1] An individual made a joint request for review and complaint to this Office, both relating to the Edmonton Police Service (the Public Body). The request for review related to an access request made to the Public Body, and was addressed in Order F2019-06.

[para 2] On the Request for Review/Complainant form, the Complainant also checked the boxes relating to the collection, use and disclosure of his personal information by the Public Body. The information provided by the Complainant in relation to this complaint referenced information exchanged between the Public Body and the City of Edmonton.

[para 3] Specifically, a City of Edmonton employee made a report to the Public Body that three individuals, including the Complainant, had exhibited inappropriate behaviour at a City facility. Officers employed by the Public Body attended the facility and spoke to individuals there. The City of Edmonton decided to ban the Complainant from its facility for a period of time.

[para 4] In the information before me, the Complainant focused on the actions of the City of Edmonton, rather than the Public Body's actions. As such, in the Notice of Inquiry dated May 7, 2020, I asked the Complainant to clarify:

- specifically what information he believes the Public Body collected without authority under the FOIP Act;
- specifically what information he believes the Public Body used without authority under the FOIP Act; and
- specifically what information he believes the Public Body disclosed without authority under the FOIP Act

[para 5] The Complainant's response, dated June 5, 2020, primarily addresses the accuracy of the information recorded by officers of the Public Body. He argues that the Public Body did not verify the accuracy of the information it collected. The Complainant states that this is an inappropriate collection under the FOIP Act. He also argues that the information was altered by the Public Body.

[para 6] The Complainant argues that the Public Body used his personal information to issue a ban from a City of Edmonton facility. I determined that the duty under the FOIP Act that best relates to this concern and the concern about the accuracy of the recorded personal information is the duty to ensure the accuracy and completeness of information used to make a decision about an individual under section 35(a). I therefore asked the Public Body to address this issue, as set out in my letter of June 8, 2020.

[para 7] In that letter, I noted that the Complainant's concerns also related to the accuracy of the Complainant's personal information in the custody and control of the

Public Body. In this regard, I informed the Complainant that he may request a correction of his personal information.

II. ISSUES

[para 8] By letter dated June 8, 2020, I set the issue for the inquiry as follows:

Did the Public Body use or intend to use the Complainant's personal information to make a decision directly affecting him – specifically, a decision to ban him from City of Edmonton facilities? If yes, did the Public Body make every reasonable effort to ensure the personal information was accurate and complete, as required by section 35(a) of the Act?

[para 9] I also noted that the Public Body's authority under the FOIP Act to collect the Complainant's personal information is not an issue in this inquiry at this time. This is because the Complainant did not object to the Public Body's authority to collect his personal information. His objection with respect to the collection is that he believes the information about him was inaccurate.

[para 10] For context I asked the Public Body to provide a brief description of its purpose and authority to collect the Complainant's personal information (specifically, the personal information about the Complainant in the records provided with his submission).

III. DISCUSSION OF ISSUES

[para 11] Section 35(a) of the Act states:

35 If an individual's personal information will be used by a public body to make a decision that directly affects the individual, the public body must

(a) make every reasonable effort to ensure that the information is accurate and complete...

[para 12] In order for section 35(a) of the Act to apply, the Complainant's personal information must have been used to make a decision that directly affected him.

Is the information at issue the Complainant's personal information?

[para 13] The information at issue relates to allegations made about the Complainant's conduct at a City of Edmonton facility. This information is personal information of the Complainant.

Did the Public Body use or intend to use the Complainant's personal information to make a decision directly affecting him?

[para 14] The Public Body states that the decision it made about the Complainant is a decision whether to pursue a criminal investigation into the conduct as reported to the

Public Body. It ultimately decided not to conduct an investigation. The Public Body identified the information used to make this decision, including statements and observations made to the Public Body by various witnesses.

[para 15] The constable assigned to the file recorded his assessment of the case. The Public Body states that some of this information “may also have been used to influence the EPS decision as to how to proceed with the investigation. However, most of the information included in this category was actually collected (or created) after the EPS had already made the decision not to investigate matters any further” (initial submission at para. 39).

[para 16] The Public Body argues that the information to which section 35(a) is relevant consists of their parties’ opinion of the Complainant as well as the constable’s opinions recorded before the investigation was ended.

[para 17] The Public Body also states that it did not use any information to make a decision to ban the Complainant from the City of Edmonton facility. This decision was made by the City of Edmonton. The Public Body states that the Complainant misunderstood the ban, believing there to be a ban from the Public Body as well as the ban by the City (at para. 8).

[para 18] As will be discussed, the Complainant had been informed prior to this inquiry that the only ban was issued by the City. However, the Complainant believes that the Public Body also made a decision to ban him from the City facility.

[para 19] With his initial and rebuttal submissions, the Complainant provided copies of the Public Body case file from the incident, which was provided to him in response to an access request. The file contains notes of the constable who investigated the report made by the City of Edmonton employee. The notes made by the constable state that he believed that a ban was appropriate, and that he informed the Applicant of the ban. The notes state (FOIP records attached to Complainant’s initial and rebuttal submissions, at page 9 para. 10):

I explained to [the Complainant]... that I was banning him indefinitely from all City of Edmonton Leisure Centres. [The Complainant] enquired about how to get the ban lifted and in instructed him to contact the Leisure Centre via telephone and plead his case to them and if they decided to lift the ban they would contact me and I would submit a follow up revoking the ban.

[para 20] These notes are not a transcript of what was said to the Complainant by the constable but there is no reason to doubt the message was substantially the same. In these notes, the constable indicates he was banning the Complainant from City facilities. The constable also indicates the Complainant that the City was responsible for making the decision, as the Complainant would have to go to the City to have the decision reversed. Based on these notes alone, the constable’s role in the decision to ban the Complainant from the City facility is unclear.

[para 21] In a variation request that followed the Public Body's initial submission, the Complainant provided additional evidence, consisting of emails between City employees (provided to the Complainant in response to a FOIP request) that indicates City employees may also have believed that the Public Body and/or the constable issued a ban to the Complainant. For example, an email from a City security advisor to another City employee refers to the "Police" having banned the Complainant. The Complainant also provided me with what appears to be notes written by a City employee regarding the matter, which states that "[b]ased on the information received from [the Public Body constable] Citizen Services was advised of the EPS ban" (attachment to Complainant's variation request, at page 7 of 8).

[para 22] These emails and notes were created by City employees other than the employees at the facility when the constable investigated the complaint against the Complainant. I understand that the decision to ban the Complainant from the facility was made the day the constable attended the facility. It appears that the employees involved in the communications provide by the Complainant were not directly involved in the decision the day it was made and are relating what they were told about the events that led to the ban.

[para 23] Additionally, where a City employee in the records provided by the Complainant referred to a ban imposed by the constable, that employee may be speaking of that ban being imposed on behalf of the City. A corporate security advisor with the City noted that the constable had indefinitely banned the Complainant from one City facility; the advisor notes that she advised the constable that the City's practice is to impose the ban across all facilities. The advisor notes that the constable offered to relay this new scope of the ban to the Complainant but the advisor informed the constable that this new scope would be relayed in writing by the City.

[para 24] By letter dated July 31, 2020, I asked the Public Body to clarify whether these City employees, to the extent that they may have believed the Public Body issued a ban to the Complainant, were in error; or whether it is possible that the constable issued an initial ban prior to the City's ban.

[para 25] The Public Body agreed that it appears possible that while the Public Body constable believed he was communicating the City's ban, some City employees believed he was imposing a Public Body ban. The Public Body notes that that other communications in the evidence provided by the Complainant show that other City employees understood that the Public Body constable was merely communicating the City's ban of the Complainant.

[para 26] Other information provided by the Public Body and the Complainant in their respective initial submissions supports the Public Body's assertion that it did not issue its own ban to the Complainant. The Public Body points to page 12 of the records provided to the Complainant in response to his access request (a copy of these records were provided by the Complainant with his submissions). Page 12 consists of follow up notes written by the constable, after meeting with City employees to discuss the events that led

to the ban. These notes state that following this meeting, the constable contacted the Complainant to clarify that there was only one ban imposed by the City, and that there is no police ban. The constable also noted that he advised the Complainant that the police would be involved only to enforce the City's ban. The notes indicate that the Complainant was satisfied with this explanation at that time.

[para 27] The Complainant also initiated a judicial review of the City of Edmonton's and Public Body's actions with respect to the ban; the decisions related to the judicial review support the Public Body's statement that the ban was a decision of the City and not the Public Body.

[para 28] In these other legal proceedings on this matter, the confusion about the ban(s) was noted but the accepted facts are as the Public Body has described here: the Complainant was initially banned from City facilities indefinitely, as communicated by the constable. The constable later clarified with the Complainant that the ban was imposed by the City and not the Public Body. The City then notified the Complainant that the ban would be for two years.

[para 29] While the Complainant was initially told that the ban was indefinite, the records show that the City decided on a definite period of two years, which was communicated to the Complainant in writing. The City's written notice to the Complainant does not make any mention of another ban issued by the Public Body. In other words, had the City's two-year ban amended an indefinite ban imposed by the Public Body, presumably this would have been communicated to the Complainant.

[para 30] As noted by the Public Body, the records of emails between City employees on the matter, provided by the Complainant, show that while some City employees believe the ban had been imposed by the Public Body or constable (at least initially), other employees understood that the constable had been communicating a ban imposed by the City.

[para 31] I accept that the Complainant had reason to be confused about who imposed the ban. The initial communication of the ban by the Public Body constable was unfortunately unclear. The Complainant's initial impression that the Public Body imposed its own ban was likely reinforced by the records showing that some City employees had the same understanding.

[para 32] The balance of the evidence before me discussed above leads me to conclude that the decision to ban the Complainant was made by the City and not the Public Body. The constable understood that his initial communication of the ban to the Complainant on March 31, 2016 may have been unclear. He followed up with the Complainant on May 1, 2016 after a conversation with City employees, and clarified with the Complainant that the only ban in place was imposed by the City. The City employees who appear to have believed – at least initially – that a ban was imposed by the Public Body and/or the constable were not present when the first decision to ban the Complainant was made. They were communicating information as they understood it. There is no additional

evidence that indicates the Public Body imposed its own ban on the Complainant. Unlike the City, the Public Body did not follow up with the Complainant in writing about the ban.

[para 33] In my view, while there is sufficient evidence of miscommunications on this matter, there is insufficient evidence to find that the Public Body issued a ban in addition to the ban issued by the City.

[para 34] I agree with the Complainant that the records indicate that the constable recommended to the City employee he spoke with on March 31, 2016 that the Complainant be banned from the City facility. I agree that it is possible or perhaps likely that this recommendation influenced the decision to ban the Complainant. Nevertheless, a recommendation from the constable is not the same as a decision by the constable or the Public Body.

[para 35] I accept that the only relevant decision made by the Public Body was whether to pursue a criminal investigation. The Public Body decided an investigation was not appropriate in the circumstances.

Did the Public Body make every reasonable effort to ensure the personal information was accurate and complete, as required by section 35(a) of the Act?

[para 36] “Every reasonable effort” has been interpreted by this Office to mean:

Every reasonable effort is an effort which a fair and rational person would expect to be done or would find acceptable; the use of “every” indicates that a public body’s efforts are to be thorough and comprehensive and that it should explore all avenues in verifying the accuracy and completeness of the personal information. (See Orders F2006-018 at para 111 and F2017-39)

[para 37] The information used by the Public Body in its decision whether to pursue a criminal investigation consisted of statements made by third parties about the Complainant’s conduct, as well as the investigating constable’s opinion of the matter.

[para 38] The Public Body argued that section 35(a) does not apply to information provided to the Public Body by a third party. It cites Order F2006-018 in support of this argument, which states (at para. 104):

The second statement regarding the prior physical condition is in a memo of November 28, 2005 from a physician. As the statement is contained in a document that was prepared and submitted to the Public Body by a third party, I do not believe that the Public Body has a duty under section 35(a) of the Act to make reasonable efforts to ensure that it is accurate. The statement forms part of a third party opinion and the integrity of a record not prepared by a public body should be maintained, as has been discussed in the context of section 36 of the Act (Order 97-020 at para. 132).

[para 39] In Order 97-020, cited in Order F2006-018, former Commissioner Clark found that a public body cannot correct an opinion under section 36, “because of the necessity of maintaining the integrity of the records in certain situations” (at para. 132).

[para 40] Other Orders of this Office have addressed the accuracy of recorded statements, with respect to section 36. Order F2017-40 follows Order F2007-018, which states (at paras. 29-30):

In Order 97-020 (at para. 127), the former Commissioner provided the following explanation for not correcting a third party statement:

That reason involves maintaining the integrity of the record in certain situations, such as investigations in which a third party’s statements have been recorded. In investigations, there is a need to record statements accurately, in order later to make a decision relating to what was said, and to understand the basis on which a decision was made. Accordingly, a third party’s statement of fact cannot be corrected, even if that statement of fact is in error. The statement does not appear for the truth of it; it appears for the fact that it is what was said, truthful or not.

If information is a record of a statement by a third party about an individual, it cannot be concluded that the information is inaccurate unless there is evidence that the third party’s statement was not accurately recorded (Order 97-020 at para. 128; Order F2003-019 at para. 37). This is so whether the third party statement is a fact or an opinion (Order 97-020 at para. 133), and whether a recorded statement is right or wrong (Order 97-020 at paras. 122 and 127; Order 2000-001 at para. 16).

[para 41] Order F2017-40, following Orders F2007-018 and 97-020 on this point, was upheld on judicial review (*Alane Davis v. Alberta (Information and Privacy Commissioner) Jill Clayton*, Alberta Court of Queen’s Bench oral decision, February 28, 2018 (Court File Number 17090095)).

[para 42] I agree with the above analyses. The statements made to the Public Body are not recorded as containing factual information about the Complainant. The Public Body recorded the statements as they were made. The truth of the allegations contained in the statements were for the Public Body to investigate, as it needed to. If the statements were determined not to contain accurate information, it is not reasonable for the Public Body to delete or amend the statements. To do so would alter or destroy the record of events, which explain the actions taken by the Public Body.

[para 43] The Complainant argues that the notes made about the call from a City employee to the Public Body were not accurately recorded. Even if this were true and the Public Body made an error in transcribing the call, the Public Body followed up with the City employee who made the call, to confirm the statement. This is a reasonable step to ensure the accuracy of information.

[para 44] Further, it appears that the Complainant misunderstands the Event Chronology record provided to him by the Public Body (a copy of this was provided to me by the Complainant). The Complainant appears to believe that the events reported by

a City employee were made in her call to the Public Body; he has provided a recording of that call and states that the call does not reflect the notes in the Event Chronology. However, the call is only briefly summarized in the Event Chronology (recording the date, name of caller, and type of complaint being made). The more detailed information was obtained by Public Body officers when they went to the City facility and spoke with the employee. This might explain why the Complainant believes the audio recording of the call and the Event Chronology don't match.

[para 45] The Complainant has also argued that the City employee who called the Public Body to report the Complainant's conduct "is neither a witness nor complainant [and] is in no position to report [the alleged conduct] herself since she is neither a victim nor a witness of [the alleged conduct]" (initial submission at page 1). The Complainant seems to believe that the notes taken of this call must be in error because the employee who made the call does not have standing to make the report. It is not clear why the Complainant believes the employee cannot make a report to the Public Body without being a witness or victim of the alleged conduct. In any event, that the employee was neither a witness nor a victim does not bar her from reporting the conduct to the Public Body, nor does it indicate that the notes taken about the call are erroneous or falsified as alleged.

[para 46] The Complainant has argued that many of the statements recorded by the Public Body contain erroneous information. As above, it is important for the Public Body to be able to record the statements made by third parties, as they were made. It is then up to the Public Body to determine the accuracy of the information in the statements.

[para 47] In this case, the Public Body decided not to pursue the complaints made against the Complainant. Therefore, it was not necessary for the Public Body to determine if each statement contains accurate information. The obligation to ensure accuracy of information in section 35(a) applies only to information that the Public Body will use to make a decision about an individual. As the Public Body decided not to pursue the complaints, there was no reason for the Public Body to investigate and determine whether each statement was true.

[para 48] The Public Body cites Order F2013-14, which states (at para. 79):

Given these considerations, in my view, despite its broad wording, section 35(a) is to be engaged primarily in relation to information that does not depend, for the determination of its accuracy, on a quasi-judicial process. Rather, resort may be had to it where a public body is to make a decision on the basis of information the accuracy of which is readily ascertainable by reference to concrete data. As the Adjudicator noted in Order F2006-019, section 35 is intended to promote fair information practices and data quality in relation to personal information.

[para 49] In that Order, the Director of Adjudication also noted that the Public Body in that case "made adequate efforts to ensure that the personal information necessary for it to make its decision was before it" (at para. 80).

[para 50] Before commenting on whether the Public Body's actions amounted to adequate efforts to ensure the accuracy of personal information, I want to be clear that there is a distinction between reviewing whether a public body met its obligations under section 35(a) and reviewing police conduct. It is not my role to review whether the constable ought to have interviewed particular witnesses, or obtained certain statements or evidence. There are other processes and other bodies that have the authority to review police conduct; from the submissions before me, it appears that the Complainant has pursued these processes.

[para 51] I have noted that in this case, the Public Body officers followed up on the report from the City employee by interviewing the employee, and interviewing or obtaining statements from other City employees and witnesses. My authority extends to finding whether these steps were adequate for the purpose of section 35(a), and I find that they were.

[para 52] A public body may collect information that it ultimately determines is not necessary to make a decision regarding the relevant individual; this is discussed in Order F2012-05 (at para. 30):

I note that the Public Body does not need to rely on all information collected when making a determination under the WCA, in order for that collection of information to be authorized under the FOIP Act. Often at least some of the information collected will not ultimately be relied on to make the determination; part of a case manager's job is to sort through the information that they have sought out or that is presented to them, to decide what is relevant. It would not be practical to thwart the work of investigators carried out in good faith, by the prospect that after the fact, what they collect will be judged, with hindsight, to be irrelevant as evidence and the collection to have been unauthorized. In my view, the investigator may collect any information that could reasonably be said to be related to the matter under investigation and potentially relevant. It need not ultimately be proven to be relevant in fact.

[para 53] In my view, this is relevant to section 35(a); a public body needn't follow up on all information collected during an investigation if the information is ultimately not used in the investigation or to make a decision in relation to the investigation. It would be impractical to require public bodies to follow up on information they do not need to use at all, simply because it was collected as possibly relevant at one time. (The question of whether all information was collected with authority is separate from the issue of accuracy under section 35(a), and is not an issue in this inquiry).

[para 54] The Complainant has argued that one of the officers involved in the investigation falsified the report by recording erroneous information. With its initial submission, the Public Body provided an affidavit sworn by this officer; he described the relevant chronology of events and the statements made to him by witnesses and City employees. He states that he "tried to be as accurate and complete as possible in [his] documentation" (at para. 9).

[para 55] The Complainant's reasons for believing the officer falsified his report (or otherwise erroneously recorded statements) include that the Event Chronology doesn't match the audio transcript of a call made to the Public Body (this apparent disagreement is discussed above). The Complainant also argues that the statements cannot be true because they indicate serious misconduct and he was not charged with such misconduct.

[para 56] That the truth of the statements made to the officer was not verified does not support the Complainant's allegations that they were falsified; my understanding is that the truth of the statements was not verified because the Public Body did not pursue the complaints such that the truth of the statements were not relevant to any decision the Public Body was to make.

[para 57] For the same reasons as discussed above, section 35(a) does not impose an obligation on the Public Body (or this Office as part of a review or inquiry) to now investigate the complaints to determine whether they were accurately recorded.

[para 58] The Complainant has argued that the Public Body used his personal information without authority to issue a ban. As discussed, the Public Body did not issue the ban; therefore, his information was not used by the Public Body to make that decision.

[para 59] The Public Body used the Complainant's personal information to decide whether to pursue an investigation into his alleged conduct. It decided a further investigation was not required. I find that the Public Body made reasonable efforts to verify the accuracy of the Complainant's personal information, commensurate with the decision made about the Complainant. This meets the Public Body's obligation under section 35(a).

[para 60] The Complainant also argues that "there was inappropriate distribution of the information since this Case File has been retained by Police in its database (in spite of the inappropriate collection of the unsubstantiated information) and is accessible to every EPS officer that pulls my name to check records associated to me" (initial submission, at page 3).

[para 61] In a variation request dated July 28, 2020, the Complainant also stated:

The [Complainant] requests that the Public Body address what is its intent with regard to retention and distribution of the personal information (the information is currently being distributed to all EPS members on the EPS computer system) and for how long, since the Alberta Court of Appeal in its ruling stated the following:

"[10] The appellant asks us to expunge the City and EPS records. We agree with the submissions of the respondents that the appellant must avail himself of the processes pursuant to the *Freedom of Information and Protection of Privacy Act*, RSA 2000, c F-25 to address his issues respecting these documents. See *Opal v Edmonton Police Service* (August 17, 2005), Alberta 0503-08558 (Alta QB),

unreported.” **Citation: Kaufmann v Edmonton (City) Police Service, 2019 ABCA 272**

[para 62] The Complainant’s complaint about “distribution” is based only on the fact that the information is retained by the Public Body. The Complainant has not alleged or provided evidence that the Public Body has disclosed the Complainant’s information. His issue appears to be that the information *could* be disclosed or used because the Public Body continues to have the information.

[para 63] Section 35(b) of the FOIP Act requires a Public Body to retain personal information that was used to make a decision about an individual for at least one year after the use. The FOIP Act does not have an obligation to maintain personal information for a maximum period of time. There are many purposes for which public bodies retain information, which will require different retention periods. Therefore, there is no obligation under the FOIP Act that relates to this part of the Complainant’s complaint, especially as I found that the Public Body fulfilled its obligations under section 35(a).

[para 64] I understand that the Complainant objects to the fact that unsubstantiated complaints about him remain on Public Body files. Unsubstantiated statements or complaints made about individuals do not become substantiated by virtue of their retention in the files. While I understand that it must be frustrating for unsubstantiated complaints to remain on file with the Public Body, the FOIP Act does not prohibit this retention, likely because there is value to retaining complaints that were made and investigated, even if they were not substantiated as true.

V. ORDER

[para 65] I make this Order under section 72 of the Act.

[para 66] I find that the Public Body fulfilled its duty under section 35(a) of the FOIP Act.

[signature by AS removed by AH]

Amanda Swanek
Adjudicator